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CASES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 371

LOUIS KREIGER,

Petitioner,

against

HELENE KREIGER,

Respondent.

RESPONDENT'S BRIEF

Statement

This is an appeal by the petitioner from an order and judgment to the Court of Appeals of the State of New York (R. 63) and the judgment entered thereon in the Supreme Court, New York County (R. 65); which unanimously affirmed an order and judgment of the Appellate Division of the Supreme Court of the State of New York, First Department (R. 62) which, affirmed, two justices dissenting, the order and judgment appealed from of the Supreme Court of the State of New York, New York County (R. 1, 2), which order, pursuant to Section 1171b of the New York Civil Practice Act granted respondent's application for a money judgment for alimony and sup-

port arrears due from petitioner under a judgment of separation entered in said Supreme Court on December 9, 1940 in the Office of the County Clerk of New York County (R. 31). Said judgment is in the sum of $3,960 representing unpaid arrears of alimony for a period of 66 weeks commencing December 11, 1944 (R. 2).

Facts

The respondent and petitioner were married in the City of Yonkers, State of New York on February 19, 1933, and thereafter resided in the County and City of New York; on March 28, 1934, a son, Miles, was born, the only issue of the marriage. In or about the month of August, 1935, the parties separated (R. 27).

Thereafter, the respondent instituted an action for a separation in the Supreme Court of the State of New York, New York County. The action was tried on September 23rd and 24th, 1940, and a full and complete trial of the issues was had. On October 21, 1940, Mr. Justice SAMUEL I. ROSENMAN rendered his decision granting judgment in respondent's favor (R. 22).

On December 9, 1940 a separation judgment was duly entered in the Office of the Clerk of the Supreme Court of the State of New York, New York County, granting to the respondent custody of the child and $60 per week as alimony (R. 31). An appeal from the aforesaid separation judgment was taken by the petitioner herein to the Appellate Division of the Supreme Court of the State of New York, First Department, which unanimously affirmed the judgment of the Supreme Court (R. 23). Petitioner personally appeared in the New York separation action, vigorously litigated same, and the appeal which he thereafter took from the aforesaid judgment was unanimously affirmed by the New York appellate court, as aforesaid (R. 23).

Thereafter, and in the month of November, 1944, the respondent commenced an injunction action to restrain the petitioner from commencing, instituting, prosecuting or proceeding with any action for divorce or separation against respondent in any state of the United States or in any territory or dependency thereof, or in any foreign country, except in the State of New York (R. 33).

In conjunction therewith, respondent obtained a temporary stay against petitioner from commencing or prosecuting any action for a divorce in any jurisdiction outside of the State of New York, pending the determination of her motion for a temporary injunction for the same purpose. On November 27, 1944, the Supreme Court of the State of New York, New York County, enjoined the petitioner and his representatives from "prosecuting, going forward, seeking to serve respondent with legal process, or taking testimony, or taking any further steps or procuring any act to be taken or done, or in attempting to secure or securing any judgment, decree or relief of divorce, commenced or attempted to be commenced by the petitioner herein against the respondent," and specifically referred to any proceeding by the petitioner in the State of Nevada. Said temporary injunction further restrained the petitioner from contracting or entering into marriage with any other person (R. 39).

Nevertheless and notwithstanding the aforesaid restraining order which was served personally on the petitioner in Nevada, he proceeded to obtain a decree in the latter State on the 12th day of December 1944 (R. 19). The respondent was never served personally with process in the State of Nevada and she never appeared therein (R. 19). The Nevada divorce decree directed the petitioner to pay a reasonable sum for the support and maintenance of the child (R. 20). In accordance therewith, petitioner forwarded to the respondent his check payable to Miles Kreiger in the sum of $50 monthly, simultaneously with

the entry of the Nevada decree, and he ceased making payments to the respondent under the New York judgment of separation.

On March 22, 1946, respondent commenced a proceeding against petitioner, under Section 1171b of the New York Civil Practice Act, in the New York Supreme Court, New York County for the recovery of the sum of $3,960 due her as alimony arrears, which proceeding resulted in a judgment in her favor in said sum (R. 2). The judgment was subsequently affirmed by the Appellate Division, Supreme Court of the State of New York, First Department, two justices dissenting (R. 62), and unanimously affirmed by the New York Court of Appeals (R. 63).

Thereafter petitioner was granted a writ of certiorari by this Court (R. 66).

Argument

1. The separation judgment rendered on December 9, 1940, by the Supreme Court of the State of New York, New York County, in favor of the respondent and against the petitioner, is a valid and subsisting mandate and cannot be automatically extinguished by a judgment or other judicial decree of a foreign jurisdiction where one of the parties thereto did not appear. To permit a judgment of one state to be automatically extinguished by the rendition of a judgment by a Court of another state where one of the parties involved does not appear necessarily infringes upon the sovereignty of the state rendering the first judgment, and is in violation of the United States Constitution, commanding each of the forty-eight states to give full faith and credit to the judgments of sister states.

2. Petitioner's contention on this appeal, namely that the Nevada divorce decree supersedes or extinguishes the

New York separation judgment, if sustained, must necessarily operate to invalidate the Nevada judgment. If petitioner contends that the Nevada decree purports to vitiate or nullify the New York separation judgment, he is admitting that the Nevada Court failed to give full faith and credit to an outstanding valid judgment of a sister state. The only way the New York separation judgment could be modified or annulled would be for the parties to that judgment to submit themselves personally to the jurisdiction of another court in another state, or by an appropriate proceeding in a court of competent jurisdiction in the State of New York. A judgment obtained by one of the parties on constructive notice without the personal appearance of one of the parties cannot operate to nullify a judgment previously obtained in another state. Otherwise the full faith and credit clause of our Constitution could have no reasonable application.

This Court has never determined the validity of a divorce decree obtained under such circumstances, subsequent to and in the face of a valid matrimonial judgment previously obtained between the parties in another state where both the subject matter and the parties were subject to its jurisdiction.

3. Petitioner's Nevada divorce decree was obtained in violation and in face of an existing valid injunction restraining him from doing so. Said injunction was made in an action in which the New York State Supreme Court had continuing personal jurisdiction over the petitioner.

POINT I

The New York judgment of separation between the parties hereto, rendered on December 9, 1940, is a valid and subsisting mandate. It cannot automatically be extinguished by a foreign decree of divorce rendered by a court not having personal jurisdiction over both parties involved therein.

A substantial portion of petitioner's brief is devoted to a discussion of the Nevada divorce, and an attempt to establish its validity. That is not the issue here at all, nor may the petitioner raise it. Independently of the validity or invalidity of the Nevada divorce, the petitioner is under an absolute, unconditional and continuing obligation to pay the installments of permanent alimony as they accrue until such time as a court of competent jurisdiction, whether it be in New York, or elsewhere, renders a judgment terminating or suspending the alimony. This has not been done, nor even attempted in the instant proceeding.

In the case of *Harris* v. *Harris*, 197 App. Div. 646, 189 N. Y. Supp. 215, the wife, after obtaining a judgment of separation in New York awarding her alimony, went to Nevada and obtained a decree of divorce on constructive service and without an appearance by the defendant. The husband thereupon made application in the New York court to strike out the award of alimony from the separation judgment. The Appellate Division, in affirming the order, declared as follows:

> "Defendant also contends that the decree of divorce obtained by plaintiff in Nevada operated to deprive her of the right to any alimony which accrued after the decree. But the order, relieving defendant from payment of further alimony, which we herewith affirm, is limited to alimony which would

accrue after the making of the motion upon which the order was entered. It did not affect alimony which accrued before the motion was made" (p. 649).

In the *Harris* case, it was the wife who obtained the foreign decree of divorce, not the husband; but independently of that fact, the court held that even where the husband was entitled to a termination of the alimony provision in the separation judgment, it was only as to future, not accrued alimony. We respectfully request this honorable court to compare these facts to those in the case at bar, in which, (1) it is the husband who obtained the foreign divorce, the wife having never been served nor appearing; and (2) no order has been made—not even requested—to strike out or suspend the alimony payments.

It is a wholly irrelevant and extraneous question, on this appeal, whether the Nevada divorce is binding in New York or not. The respondent has contended right along that the Nevada court never obtained jurisdiction over her, since she was not served with process in Nevada and never appeared; but entirely apart from that fact, the separation judgment of this court, which was rendered upon personal service of the summons and complaint on the petitioner in New York, and a trial upon the merits in which he participated—a judgment, incidentally, which was thereafter unanimously affirmed by the Appellate Division—continued in full force and effect as a binding and subsisting mandate. What the petitioner attempted to do on this motion was to obtain a declaratory judgment that the Nevada divorce supersedes and vitiates the New York judgment of separation—that is, that this Court should give a greater measure of faith and credit to the Nevada decree than to the New York judgment, entered four years prior thereto. (See *Bassett* v. *Bassett*, *infra*.)

Each installment of permanent alimony as it accrues under the separation judgment is the wife's vested property right (*Sistare* v. *Sistare*, 218 U. S. 909). The New

York Court of Appeals so held, in *Harris* v. *Harris*, 259 N. Y. 334:

> "These past due sums (of accrued alimony) have become vested rights of property in the plaintiff which the Supreme Court has no power to take from her" (p. 337).

The petitioner can no more impugn this indebtedness than if it arose on a promissory note or any express contract. Indeed, he has even less right to do it in view of the fact that the obligation of alimony is supported by public policy and the strongest social considerations, bearing in mind that the allowance here is both for the child as well as the wife. The New York courts have so held, all the way from Special Term to the United States Supreme Court. Before discussing them however, it may be well to point out that independently of these decisions, and wholly aside from the merits of the matter, the petitioner stands before this Court as an avowed delinquent who has deliberately and wilfully flouted its process. He has not only disobeyed the judgment of separation, by deliberately and inexcusably failing and refusing to pay the alimony: he has flouted the solemn mandate of this Court in prosecuting the divorce action in Nevada. Included in the Record herein is the order that was made on November 27, 1944, signed by Mr. Justice O'Brien, granting the plaintiff's motion for an injunction, and expressly enjoining and restraining the defendant and all other persons from prosecuting that action. It also forbids and enjoins the defendant from remarrying; yet, he not only went ahead with that action and obtained the divorce, but remarried (R.).

Our Federal courts have held on at least two occasions that the defendant husband is under an absolute obligation to pay the alimony accruing under a judgment of separation, notwithstanding the fact that he has obtained a foreign decree of divorce, on constructive service and without an appearance, and independently of the validity or invalidity

of his divorce. The most recent statement to that effect is *Durlacher* v. *Durlacher*, 123 Fed. (2nd) 70; certiorari denied, 315 U. S. 805, an action in the Federal court in Nevada by the plaintiff-wife in a New York separation action, to recover arrears of alimony accruing thereunder, in the face of a constructive service, default decree of divorce obtained in Nevada by the defendant. In that case, the court held:

> "Since the New York supreme court had acquired and retained jurisdiction in personam over Simon (defendant), he had the right to appear in the action there and plead the fact, for it is but a fact from the standpoint of the New York tribunal, that the Nevada divorce decree had ended the matrimonium and hence the right to maintenance during the separation had terminated.
>
> Nevertheless in New York Simon could have brought a suit in which he would have been entitled to show that the court had lost jurisdiction in the maintenance proceeding. If successful he could have restrained Helen (plaintiff) from procuring execution or suing on her New York judgment in the maintenance proceeding. However, he could not have prevailed in such a separate suit because the divorce decree he would have pleaded as causing the loss of jurisdiction in the maintenance proceeding was obtained without Helen's appearance therein or her presence in Nevada or her service within that state. New York holds invalid a divorce decree so obtained. Hence, in New York, Helen's maintenance judgment was secure from collateral attack and would be given full faith and credit in that jurisdiction" (pp. 71-72).

If the petitioner cannot challenge the separation judgment in Nevada, where he got the divorce, how can he challenge it in New York, which granted the separation?

Moreover, how can the Nevada divorce supersede the New York judgment of separation when the petitioner could not even had had the alimony reduced except by

an appropriate application to the New York court? Could the Nevada court have entertained an application by the petitioner to reduce the alimony? Of course not. Only the New York court had the power to do so. Nevertheless petitioner now takes the position that the entire New York judgment could be extinguished by the action of the Nevada court in the instant proceeding—by a judgment of a sister state rendered on constructive notice without personal jurisdiction of both parties.

If the Nevada court was so jurisdictionally impotent as to be unable to effect a change or modification of the New York judgment of separation, by what authority or power can it completely nullify the entire judgment? The Nevada court could only do so where both parties personally submitted to its jurisdiction. Short of that condition, the Nevada court could do nothing to modify, alter, change, nullify, supersede or vitiate the judgment of separation in the State of New York.

In *Barber* v. *Barber*, 21 How. 582, the plaintiff wife who had obtained a separation judgment in New York, with an award of alimony, went into the Federal court in Wisconsin, where the defendant had established a residence, and brought suit against him for the arrears. In opposition to the suit, the defendant contended, among other things, that he had obtained a decree of divorce in the Wisconsin court, and that he was therefore relieved of all obligation under the separation judgment. The court overruled his contention, and held as follows:

> "It is not necessary for us to pass any opinion upon the legality of the decree, or upon its operation there or elsewhere to dissolve the *vinculum* of the marriage between the defendant and Mrs. Barber. It certainly has no effect to release the defendant there and everywhere else from his liability to the decree made against him in the State of New York, upon that decree being carried into judgment in a

court of another State of this Union, or in a court of the United States, where the defendant may be found, or where he may have acquired a new domicil different from that which he had in New York when the decree was made there against him" (p. 588).

Both the *Durlacher* and *Barber* cases, *supra*, continue to be the authority with respect to the issues therein decided, and are applicable hereto. Never before has this court ruled upon the validity or effect of a matrimonial judgment, obtained on constructive notice and without the personal jurisdiction of both parties, rendered subsequent to a valid and existing matrimonial judgment in another state. Both the *Williams* v. *North Carolina* cases concern themselves primarily with the validity of a matrimonial judgment in the absence of any prior valid, existing matrimonial judgment anywhere in the United States.

On page 34 of the petitioner's brief, he states, "Had there been no prior separation decree, it is obvious that the divorce decree terminated any duty of Mr. Kreiger to support Mrs. Kreiger in the future." This is precisely the issue before the Court. The existence of a prior, valid matrimonial judgment in this case necessitates the consideration by this Court of the effect of the subsequent matrimonial judgment thereon. Respondent contends that the subsequent matrimonial judgment cannot extinguish the prior matrimonial judgment where the subsequent matrimonial judgment was obtained without the personal jurisdiction of both parties. To do otherwise would permit one state to vitiate the judgment of another by the simple procedure of one of the parties establishing a domicile in another state. Such a license would create havoc and turmoil with the judicial process in our Country, consisting of forty-eight separate sovereign states, and be contrary to the full faith and credit clause of the United States Constitution.

In a recent case, *Estin* v. *Estin* (63 N. Y. Supp. (2nd) 421, affirmed 296 N. Y. 308), plaintiff wife moved for a judgment for alimony arrears, the alimony having been directed to be paid to the plaintiff by the husband under a separation judgment in her favor. Defendant cross-moved to modify the judgment by striking out the direction for the payment of alimony. Special Term granted plaintiff wife's motion and denied the defendant's cross motion. In the course of its opinion the court specifically pointed out that the Courts of New York will retain jurisdiction over a defendant husband against whom a separation judgment has been obtained, as an incident to that judgment, because our courts, out of considerations of public policy, have a continuing interest in protecting the rights of the wife. The jurisdictional foundation for a decree in one State capable of foreclosing an action for support in another, the Court held, may be different from that required to alter a marital status with extra-territorial effect. The question of marital capacity on the one hand, and the obligation of the husband to continue paying support to the wife on the other, are two totally different matters: the courts of this State will continue to give full force and effect to its judgments, rendered in cases where both parties have submitted themselves to the jurisdiction of our courts, and that for the purpose of protecting the party who obtained the judgment, our courts will continue to retain personal jurisdiction over both parties. The position of Special Term was unanimously affirmed without opinion (*supra*).

Similarly in *Russo* v. *Russo*, 62 N. Y. Supp. (2nd) 514 (City Ct., Spec. Term Kings County, May, 1946, no official citation), the Court despite the fact that it gave full faith and credit to the defendant's Nevada divorce decree, held that the decree did not determine the plaintiff wife's rights to payments under a special agreement whereby the husband undertook to pay his wife a weekly sum during his life *and for the duration of the marriage*. After granting

the plaintiff's motion for summary judgment in her action to recover payments alleged to have been due under the aforesaid separation agreement, the court stated that this proceeding was not an action to adjudicate the marital status of the parties but one to determine the validity of the separation agreement, and concluded:

> "The end result is that while we recognize that the plaintiff and defendant are no longer husband and wife, where the matrimonial status is the direct issue to be adjudicated, we, nevertheless, say that we will not recognize the severance of the marriage for the purpose of depriving this wife of the benefits of the contract for support" (p. 521).

The court further stated:

> "I think it is important to keep in mind a basic difference between the problem of marital capacity and the problem of support" (p. 521).

It is well established in our law that under the full faith and credit clause of the Federal Constitution, if a judicial action is begun with jurisdiction over the person or party concerned, it is within the power of the court to bind that person by every subsequent order in the cause.

Michigan Trust Company v. *Ferry*, 228 U. S. 346, 348;
Esenwain v. *Commonwealth*, 325 U. S. 279;
Pennoyer v. *Neff*, 95 U. S. 714;
Rigney v. *Rigney*, 127 N. Y. 408;
Russo v. *Russo*, *supra*.

Under such circumstances it is clear that a Nevada divorce decree can have no effect on any person's right to support, when such right to support is predicated upon a judgment of a New York court which had personal jurisdiction over the parties. This proposition of law was expressed in the case of *Miller* v. *Miller*, 122 Fed. (2nd) 209

App. D. C., where a claim for unpaid alimony under a final decree of a State Court was held to be entitled to full faith and credit.

A case on all fours with the instant case is that of *Bassett* v. *Bassett*, 141 Fed. (2nd) 954, C. C. A., Nev., cert. den. 323 U. S. 718. The facts were as follows: In August, 1934, the husband left New York and established a residence in Nevada. On August 30th, 1934, the wife sued the husband in New York for a separation and obtained a judgment which provided for a monthly payment to her for support and maintenance. The judgment was subsequently modified by a reduction of alimony. On June 5th, 1939, an absolute divorce from the wife was granted to the husband in Nevada. On April 5th, 1941, the wife entered judgment in the New York court for unpaid support. The wife then brought an action in the Federal District Court in Nevada to recover the sum of the New York judgment. The District Court determined that the Reno divorce was controlling under the full faith and credit clause, and dismissed the action. The Circuit Court of Appeals of the 9th District reversed the District Court; certiorari was denied by the U. S. Supreme Court. The Circuit court, after citing the *Durlacher* case, *supra*, stated:

> "* * * since judgment entered in the New York Court was in all respects a valid judgment, it could not be set aside or affected by a judgment of another State. Counsel argue that the Durlacher case was decided upon the theory of *Haddock* v. *Haddock*, 201 U. S. 562 * * *, that the Haddock case was reversed by *Williams* v. *North Carolina*, 317 U. S. 287, * * * and therefore that the Durlacher case is not a precedent upon which a decision in the instant case can be rested.
>
> We believe that the Williams case does not affect the result reached in the Durlacher case. The State of New York had acquired jurisdiction of both parties by this appeal in the original separation and main-

tenance action and, according to its law, retained jurisdiction throughout the proceedings leading to the two judgments questioned herein * * *.

As here presented we are asked to accept the decree of the Nevada State Court which in effect attempts to set aside decrees or judgments of a Court of New York. This is the point in this appeal, and *Williams* v. *North Carolina, supra,* has absolutely nothing to do with it.

Reversed and remanded".

An interesting case is that of *In re Thorn's Estate*, 46 A. (2nd) 258, 353 Pa. 603. There, a Municipal Court order for the support of a divorced wife was recognized, even though her husband had obtained a valid divorce decree in another State. The testamentary trustee refused to make payments for the wife's support on the ground that a valid divorce decree existed against the wife. The Pennsylvania Court rejected the contention of the Trustee and directed that payment be made to the wife in accordance with the support order.

Under these circumstances, the respondent contends that the separation judgment rendered by the New York court in 1940, is a valid and subsisting judgment, and is not affected by the existence of the Nevada decree.

This contention is made despite the position taken by the petitioner, namely, that it is a well-established and long recognized rule in New York State that a valid divorce decree ends the liability of the husband to pay the wife alimony under a prior separation decree. What petitioner overlooks is that this rule applies where the court which rendered the separation agreement subsequently grants a divorce decree. The same rule does not apply where another court of a foreign jurisdiction, contrary to the provisions of the United States Constitution, grants a divorce decree. In each of the cases cited by the petitioner in sup-

port of the aforesaid principal, there exists this distinction. Thus, in *Tonjes* v. *Tonjes*, 14 App. Div. 542, *Burton* v. *Burton*, 150 App. Div. 791, and in *Gibson* v. *Gibson*, 81 Misc. Rep. 508, the very court which had previously rendered a separation judgment, subsequently granted a divorce decree.

In *Scheinwald* v. *Scheinwald*, 231 App. Div. 757, and *Richards* v. *Richards*, 87 Misc. Rep. 134, both cited in the petitioner's brief, page 29, the court which subsequently granted a divorce decree, had personal jurisdiction over the parties, and therefore, no question of recognition of a judgment of another state was in issue. This is so because parties to an action can voluntarily submit a controversy between them for adjudication in another court, even though that controversy might have been determined in one or another of its aspects in another jurisdiction. It is the contention of the respondent herein that unless the New York court, or a court of a sister state which had personal jurisdiction over the parties, rendered an adjudication involving the marital status, the New York separation judgment cannot be vitiated. Consequently, the authorities cited by the petitioner are inapplicable.

In addition, the *Richards* and *Scheinwald* cases, *supra*, are distinguishable on other grounds. By appearing generally, the spouses not only submitted the marital res itself to the jurisdiction of the foreign court—that is the marital res—but all auxiliary and incidental matters flowing therefrom, including support. In the instant case, the respondent never appeared in the foreign suit, and the decree while it provides for the support of the child (although he was not in the jurisdiction of that court), made no provision for her. Thus, assuming but not conceding, that in the instant case, the marital res was properly before the foreign court, all of the auxiliary and incidental matter flowing therefrom were not, and determinations by the New York court with respect to the latter matters, remain binding upon the peti-

tioner, at least until such time as the petitioner submits these matters for consideration in the New York courts, in accordance with the established procedure.

The case of *Solotoff* v. *Solotoff*, 51 N. Y. Supp. 2d 514, cited by petitioner in his brief on page 28, involves the superseding of a temporary alimony order, not a final judgment of a court of competent jurisdiction in a particular state. No question is raised about the right of another court to vitiate such an interim order. The question on this appeal relates to a final judgment of separation duly rendered after a full and complete trial with the court having jurisdiction over the parties and the subject matter.

For the petitioner to take the position that the Nevada decree has the force and effect of nullifying the New York separation judgment immediately raises the question of the validity of the Nevada decree on the grounds that same violates the provisions of the United States Constitution.

POINT II

Petitioner's contention, namely, that the Nevada divorce decree supersedes or extinguishes the New York separation judgment cannot be sustained in view of the full faith and credit clause of the United States Constitution.

An analysis of the petitioner's position discloses the following:

1. Admittedly a valid, binding separation judgment was rendered by the New York courts against him in an action where both parties personally appeared and the subject matter was within the jurisdiction of that court.
2. Thereafter, and in defiance of an injunction order made by the New York court, the petitioner obtained a divorce decree from the Nevada court.

3. The Nevada divorce decree supersedes the New York separation judgment because the petitioner was domiciled in the State of Nevada.

What the petitioner is actually saying is that despite the existence in our Constitution of the full faith and credit clause, the Nevada Court had the authority to vitiate a prior, existing valid matrimonial judgment where the Nevada court did not have personal jurisdiction of the parties. If this does not constitute an actual abridgment by one state of a valid and existing judgment of another, then the full faith and credit clause has no meaning.

It is the respondent's position that the New York separation judgment can only be modified, nullified, vitiated or superseded by an action in a competent court in the State of New York, or by a court in another state having personal jurisdiction over both parties. Anything short of this must necessarily be violative of the full faith and credit clause and contrary to established principles of American jurisprudence.

Notwithstanding the foregoing, it is the respondent's position that it is possible for both decrees rendered in New York and Nevada to stand without being a victim of inconsistency. It is well established that a husband has the right to establish a domicile wherever he chooses. Assuming *arguendo* that the petitioner herein legally established a domicile in Nevada, that he applied to that court to establish his marital capacity, and that the Nevada court ruled that he was no longer married, it could not possibly relieve him of his responsibility to make the support payments contained in the New York separation judgment which was not at any time within the jurisdiction of the Nevada court. Assuming that the Nevada court had the right to establish the marital capacity of the petitioner, it could not discharge the petitioner's responsibility to support the respondent and the child of the marriage who never

submitted themselves to the jurisdiction of the Nevada Court and which question had previously been ruled upon by a New York court. Support payments in New York are not conditioned upon the continuance of the marital status. Such allowances have been made by the New York courts in divorce and annullment actions. A divorce does not necessarily deprive a wife of her right to support, nor does the husband's remarriage in another state. Petitioner's brief stresses the point that the support allowance in New York was conditioned upon the marital status of the parties. Nothing is further from the truth. The New York courts adjudicated the petitioner a conjugal delinquent and imposed upon him the obligation to continue supporting his wife. If grounds existed in New York for a divorce because of cruelty, the respondent would have been entitled to a decree of divorce and support. Why should she now be deprived of that support by an adjudication presumably foisted upon the New York court which had previously decided that the respondent was entitled to support?

Under such circumstances, it is possible to conceive of the New York judgment having been superseded for the purpose of severing marital status but not for the purpose of determining husband's obligation to support. That question is still before the New York court, and the petitioner is provided with a remedy under the New York laws for modifying or eliminating his support obligation—a remedy to which he has not resorted to this day. In the absence of any affirmative steps by the petitioner in this regard, the support provisions of the New York judgment cannot be deemed nullified.

POINT III

Petitioner's Nevada divorce decree was obtained in defiance of a valid and subsisting injunction order, made by a Court having jurisdiction over his person. The Nevada divorce decree was therefore granted in defiance of said injunction order and in violation of the full faith and credit clause of the United States Constitution.

The petitioner was enjoined by a restraining order, issued out of this court, barring him from taking any action designed to sever the marital relationship of the parties hereto or, having instituted such action, from proceeding therewith, and further enjoining him from contracting or entering into a marriage with any person other than the plaintiff herein. In violation of that order, he both proceeded with the Nevada action and remarried. Now the petitioner requests this court to modify a valid existing judgment of the New York court based upon a decree of a foreign court secured in defiance of the very court to which he had applied for relief.

The fact is that New York courts would have denied the petitioner the relief which he might have obtained by an application to terminate the support payments in the separation judgment because of his wilfull violation of the injunction order.

In a very recent case, *Palmer* v. *Palmer*, 184 Misc. 291, 53 N. Y. Supp. 2nd 784, it was held that a New York court was not bound to recognize the existence or validity of a Nevada divorce decree secured by a defendant in the face of an injunction issued by our court. Leave had been requested by the defendant husband to serve a supplemental answer setting up a foreign divorce obtained by him. His motion was denied on the ground that the foreign

divorce was obtained in disregard of an injunction restraining him from proceeding with the foreign divorce. The court further stated that the *prima facie* validity of the foreign decree was impaired by the existence of an injunction against the defendant. Moreover, the Court added that the defendant having entered a general appearance and filed an answer in the separation action, he had submitted himself to the jurisdiction of the Court and thereby bound his person to all subsequent orders and proceedings, including the injunction order. The Court also held that so long as the defendant had actual knowledge of the contents of the restraining order, even if personal service thereof was not made, the injunction order would be binding upon him. The Court writes:

> "Granted, that under the trend of present day day decisions in matrimonial actions, full faith and credit must be given to the judgments and decrees of sister States, it does not necessarily follow that in our anxiety to conform our own standards and policies to those of foreign tribunals, we are required to ignore the willful and flagrant contempt which this defendant has consistently demonstrated toward our own courts and their pronouncements. Our courts had the authority to enjoin the defendant's attempt to sever his matrimonial ties elsewhere. That has been decided. To permit this defendant, who, with full knowledge, did exactly what had been forbidden, to now have the benefit of the fruits of that act and to assert the judgment thus secured as a defense to the action previously brought in the courts of this State, would place a premium on lawlessness and condone contemptuous conduct. This court declines to be a party to any such program" (at p. 294).

In unanimously affirming the decision, the Appellate Division held (268 App. Div. 1010):

> "Under subdivision 1 of Section 878 of the Civil Practice Act an injunction order may be granted

where it appears that a defendant, during the pendency of the action, is about to do something which will render the judgment ineffectual. In this action the New York court has jurisdiction of the defendant personally as well as of the marital status of the parties, who were married in the State of New York and both of whom were domiciled in the State of New York at the time of the commencement of the action. Under these circumstances the defendant cannot deprive this court of jurisdiction by removing from the State. We are not called upon to decide the validity in New York of the Nevada divorce should one be granted. Sufficient for this decision is the fact that the defendant is attempting to render the judgment of separation ineffectual" (p. 1011).

Lest this honorable court have any doubt as to the Petitioner's knowledge of the existence of the injunction order and its terms at the time he applied to the Nevada court for a divorce, we beg leave to refer this court to the stenographer's record of the proceedings which took place at that hearing (made part of the record herein) where the petitioner's own Nevada lawyer introduced into evidence in that action the very injunction order to which we refer (Injunction Order).

There is no contention in the instant case by the petitioner that the grounds upon which the injunction was granted were invalid. He simply attacks the manner in which service was effected. The *Palmer* case, *supra*, holds that the manner in which the injunction in this case was served was proper. In addition, in the case before us, at the time of the issuance of the original process with respect to the aforesaid injunction, namely, on November 9th, 1944, petitioner had resided in Nevada for a period of a little more than two months.

Irrespective of any subsequent action on the part of the petitioner, it is clear that at the time when Mr. Justice

CHURCH and Mr. Justice O'BRIEN issued the restraining orders, the petitioner was attempting to render the judgment of separation ineffectual, and both of the aforesaid orders were properly issued, and are valid and binding.

Similarly in the case of *Ciacco* v. *Ciacco* (50 N. Y. Supp. (2nd) 398, Spec. Term, Bronx County, not officially reported) a temporary injunction similar to the one involved herein, and which was served upon the defendant personally in the State of Nevada, was granted.

It is well established that an injunction of this character is not directed to a foreign court but rather to a person within the jurisdiction of the injunction forum for the purpose of restraining him from proceeding with a specific action. See *Royal League* v. *Kavanaugh*, 233 Ill. 175, for the prevailing American doctrine in connection with this subject. The scope of this power has been held to extend to the purpose of an act beyond the limits of the territory jurisdiction of the Court. *Cole* v. *Cunningham*, 133 U. S. 107; *Phelps* v. *McDonald*, 99 U. S. 298; *Mead* v. *Merritt*, 2 Paige 402 (N. Y.).

The New York courts have frequently utilized their injunctive power in matrimonial cases in order to prevent a spouse, adjudicated by that court as a conjugal delinquent, from resorting to a foreign jurisdiction in order to impair or impede the rights of a party litigant or its judgment or mandate. See *Greenberg* v. *Greenberg*, 218 App. Div. 104; *Goldstein* v. *Goldstein*, 283 N. Y. 146, and *Baumann* v. *Baumann*, 250 N. Y. 382.

When we remember that the injunction order in this case was issued prior to the pronouncement of this Court in *North Carolina* v. *Williams*, 317 U. S. 287, it becomes clear that the aforesaid injunction order had a legitimate objective and that the Court rendering it had the power to grant it. Violation thereof by the petitioner presents

to this Court the question as to whether in the face of these facts, the Nevada decree is valid at all.

The petitioner's brief, page 39, cites the case of *Robinson* v. *Robinson*, 254 App. Div. 696, affd. 279 N. Y. 579, as authority for the proposition that the injunction obtained by the respondent in this action had no validity against him. The *Robinson* case, *supra*, does not stand for any such a proposition. That case was an action for a permanent injunction in the New York courts which had never theretofore acquired personal jurisdiction of the defendant. The action for a permanent injunction was unrelated to any pre-existing judgment obtained after personal jurisdiction of the parties was acquired. In the instant case, the injunction was obtained for the purpose of carrying out a directive theretofore made by the courts of New York and for the purpose of avoiding any act or deed that might be performed by the petitioner which might render ineffectual the prior judgment granted with personal jurisdiction over both parties. In such cases, the Court which rendered the original judgment continues to retain personal jurisdiction over the parties, wherever they may be, in order to preserve the judgment which it rendered. It is well established that if a judicial action is begun with jurisdiction over the person or party concerned, it is within the power of that court to bind the persons affected by a judgment made in connection therewith by a subsequent order in the case. *Michigan Trust Co.* v. *Ferry*, 228 U. S. 346, 348; *Pennoyer* v. *Neff*, 95 U. S. 714.

CONCLUSION

By virtue of the foregoing, we respectfully submit that the judgment of the Court of Appeals should be affirmed and that the respondent be granted such other relief as may be proper in the premises and be awarded proper costs pursuant to statute and rules of this Court.

Respectfully submitted,

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Counsel.

SUPREME COURT OF THE UNITED STATES

No. 371.—October Term, 1947.

Louis Kreiger, Petitioner, v. Helene Kreiger. | On Writ of Certiorari to the Court of Appeals of the State of New York.

[June 7, 1948.]

Mr. Justice Douglas delivered the opinion of the Court.

This is a companion case to No. 139, *Estin* v. *Estin*, *ante*, p. —, also here on certiorari to the Court of Appeals of New York.

The parties were married in New York in 1933 and lived there together until their separation in 1935. In 1940 respondent obtained a decree of separation in New York on grounds of abandonment. Petitioner appeared in the action; and respondent was awarded $60 a week alimony for the support of herself and their only child, whose custody she was given.

Petitioner thereafter went to Nevada where he continues to reside. He instituted divorce proceedings in that state in the fall of 1944. Constructive service was made on respondent who made no appearance in the Nevada proceedings. While they were pending, respondent obtained an order in New York purporting to enjoin petitioner from seeking a divorce and from remarrying. Petitioner was neither served with process in New York nor entered an appearance in the latter proceeding. The Nevada court, with knowledge of the injunction and the New York judgment for alimony, awarded petitioner an absolute divorce on grounds of three consecutive years of separation without cohabitation. The judgment made no provision for alimony. It did provide that petitioner was to support, maintain and educate the child, whose

custody it purported to grant him, and as to which jurisdiction was reserved. Petitioner thereafter tendered $50 a month for the support of the child but ceased making payments under the New York decree.

Respondent thereupon brought suit on the New York judgment in a federal district court in Nevada. Without waiting the outcome of that litigation she obtained a judgment in New York for the amount of the arrears, petitioner appearing and unsuccessfully pleading his Nevada divorce as a defense. The judgment was affirmed by the Appellate Division, two judges dissenting. 271 N. Y. App. Div. 872, 66 N. Y. S. 2d 798. The Court of Appeals affirmed without opinion, but stating in its remittitur that its action was based upon *Estin* v. *Estin*, 296 N. Y. 308, 73 N. E. 2d 113. Respondent does not attack the bona fides of petitioner's Nevada domicile.

For the reasons stated in *Estin* v. *Estin*, *ante*, p. —, we hold that Nevada had no power to adjudicate respondent's rights in the New York judgment and thus New York was not required to bow to that provision of the Nevada decree. It is therefore unnecessary to pass upon New York's attempt to enjoin petitioner from securing a divorce or to reach the question whether the New York judgment was entitled to full faith and credit in the Nevada proceedings. No issue as to the custody of the child was raised either in the court below or in this Court. The judgment is

Affirmed.

MR. JUSTICE FRANKFURTER dissents for the reasons stated in his dissenting opinion in *Estin* v. *Estin*, No. 139.

MR. JUSTICE JACKSON dissents for the reasons set forth in his opinion in *Estin* v. *Estin*, *ante*, p. —.